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Item 77 of the preliminary list*
Responsibility of States for internationally wrongful acts

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Comments and information received from Governments

Report of the Secretary-General

I. Introduction

1. The International Law Commission adopted the articles on responsibility of States for internationally wrongful acts ("State responsibility articles") at its fifty-third session, in 2001. In its resolution 56/83 of 12 December 2001, the General Assembly took note of the State responsibility articles adopted by the Commission, the text of which was annexed to that resolution, and commended them to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action. In its resolution 59/35 of 2 December 2004, the Assembly once again commended the State responsibility articles to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action. Moreover, in the latter resolution, the Assembly requested the Secretary-General "to invite Governments to submit their written comments on any future action regarding the articles". It also requested the Secretary-General "to prepare an initial compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in this regard" and "to submit this material well in advance of its sixty-second session".

2. Following its consideration of the written comments received from Governments,[1] as well as the compilation of decisions prepared by the Secretary-General,[2] the General Assembly, in its resolution 62/61 of 6 December 2007, once again commended the State responsibility articles to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action. The Assembly again requested the Secretary-General "to invite Governments

* A/65/50.

[1] See A/62/63.

[2] See A/62/62 and Corr.1 and Add.1.

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to submit their written comments on any future action regarding the articles" and also requested the Secretary-General to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles.[3] In addition, the Assembly decided to further examine, at its sixty-fifth session, within the framework of a working group of the Sixth Committee, "the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles".

3. By a note verbale dated 6 March 2009, the Secretary-General invited Governments to submit, no later than 1 February 2010, their written comments on any further action regarding the State responsibility articles.

4. As at 10 May 2010, the Secretary-General had received written comments from Brazil (dated 1 February 2010), the Czech Republic (dated 28 January 2010), Finland, on behalf of the Nordic countries (dated 1 February 2010), France (dated 29 January 2010), Germany (dated 18 January 2010), Lithuania (dated 2 November 2009), Mexico (dated 5 February 2010), the Netherlands (dated 3 September 2009), Portugal (dated 21 January 2010), Qatar (dated 30 April 2009), the United Kingdom of Great Britain and Northern Ireland (dated 10 March 2010), and the United States of America (dated 5 February 2010). Those comments are reproduced below.

II. Comments on any future action regarding the articles on responsibility of States for internationally wrongful acts

Brazil

1. After decades of discussions and the appointment of five special rapporteurs, the Commission was able to produce a set of draft provisions that have been widely used as a reference by international tribunals and also by States. The General Assembly of the United Nations has already taken note and commended the State responsibility articles to the attention of Governments in three resolutions, adopted in 2001,[4] 2004[5] and 2007.[6]

2. In the light of the great importance of the matter, the Brazilian Government is of the view that a next step should be taken. The articles prepared by the Commission should be used as a basis for negotiations on a future convention on the responsibility of States for internationally wrongful acts, to be convened under the auspices of the United Nations.

Czech Republic

There have been no major developments requiring a change in the position of the Czech Republic on further action regarding the State responsibility articles, as reflected in its 2007 written comments.[7]

[3] See A/65/76.
[4] Resolution 56/83.
[5] Resolution 59/35.
[6] Resolution 62/61.
[7] See A/62/63.

Finland (on behalf of the Nordic countries)

1. The State responsibility articles have become the most authoritative statement available on questions of State responsibility. In numerous instances, the courts, tribunals and other bodies have referred to the articles as "established rules" or as an "expression of accepted principles" of international law.

2. The Nordic countries continue to hold the view that the articles are in the strongest possible position as an annex to a resolution. Despite the fact that there are different views on specific details, the articles reflect a widely shared consensus. A diplomatic conference aimed at producing a convention might jeopardize the delicate balance built in the articles. For those reasons, the Nordic countries consider that is it not, as for now, advisable to embark on negotiations on a convention on responsibility of States for internationally wrongful acts.

France

1. France reaffirms its support for the Commission's recommendation that an international conference of plenipotentiaries be convened with a view to negotiating a convention on this topic based on the draft articles adopted by the Commission in 2001.

2. France recalls that the mandate of the International Law Commission is the progressive development and codification of international law. It considers that the above-mentioned articles are sufficiently well developed to be ready for codification. France also believes that, in the light of the importance and novelty of some of the rules set forth in the articles, it is essential to invite States to examine the proposed rules at a conference where they could present their views. In this regard, France believes that the draft articles of the International Law Commission constitute a good basis on which to work.

Germany

1. Both German and international courts such as the European Court of Human Rights continue to refer in their decisions to selected articles of the State responsibility articles, and all assume as a matter of course that those articles are legally binding statements of customary international law.

2. Their status is thus secure under both German and international case law. In Germany's view, this trend should continue to be closely monitored and attention should in particular be paid to whether State courts accord the articles in their entirety (rather than individual articles) the status of customary international law. In the view of Germany, as long as not all States and courts do so, a binding convention should not be drawn up, in order not to jeopardize the existing consensus regarding the binding nature of the articles' main thrust.

Lithuania

1. The State responsibility articles and the accompanying commentaries take into account the theories and practices of State responsibility in a comprehensive and

balanced manner. The articles not only constitute an important contribution to the codification of legal rules regarding State responsibility, but also are very important in safeguarding international relations and maintaining the stability and development of the international legal order. The International Court of Justice and other judicial bodies already refer to the articles in their decisions.

2. Therefore, we support the discussion on convening a conference to consider the adoption of a convention on this issue. It is our understanding that the logical conclusion of the Commission's work on the codification of international law will be the negotiation and adoption of a binding treaty. The negotiations will not, however, prejudice the importance of the draft articles as a reflection of customary law and practice.

Mexico

1. Since the fifty-fifth session of the General Assembly, Mexico has emphasized that the State responsibility articles should result in the adoption of a treaty, since "[o]nly a binding instrument could offer the guarantees and certainty necessary to enable injured States to obtain reparation. States tended to disparage so-called 'soft law'. It was doubtful that a declaration would make the significant contribution to the codification of international law warranted by five decades of effort".[8]

2. At the sixty-second session, in discussing the form that the articles should take, Mexico once again stressed that "it was imperative that the international community should codify the rules on State responsibility".[9]

3. The General Assembly has repeatedly observed that "the subject of responsibility of States for internationally wrongful acts is of major importance in relations between States".[10] In this regard, Mexico is of the opinion that the articles in question constitute one of the most important developments in international law. This is a very well-conceived and balanced draft, leading from a restricted conception of international responsibility of States, basically limited to the protection of persons and their property abroad, to a fundamental legal concept which makes international rights and obligations binding within a developed legal system. The articles likewise reflect the transition from the law of nations, viewed solely as a set of bilateral regimes of a contractual nature, to the consolidation of a true legal order for the international community.

4. In this connection, Mexico considers that the State responsibility articles deserve a place, "together with the Vienna Convention on the Law of Treaties, as one of the fundamental pillars of public international law".[11] It is not a merely symbolic question; rather, it provides the binding force that the international community wishes to give to the law of international responsibility of States. Mexico agrees with those members of the Commission who at that time drew attention to the imbalance that would be created where primary rules were more comprehensively codified than secondary rules,[11] and stresses that this imbalance

[8] A/C.6/55/SR.20, para. 45.
[9] A/C.6/62/SR.12, para. 79.
[10] See resolutions 59/35 and 62/61.
[11] A/56/10 and Corr.1, para. 62.

could in the long term be detrimental to the coherence and effectiveness of international law.

5. Likewise, the important role that the adoption of a treaty would play in the stabilization and certainty of the rules on international responsibility of States, and regarding their continued existence over time, must be recognized. In the opinion of Mexico, that would be without prejudice to the process of forming international custom regarding the matter. On the contrary, the work of the Commission has shown in other fields, such as treaty law,[11] the continuous and positive impact that it can have on the development of customary law.

6. Mexico also wishes to underline in this context the enormous potential of a treaty on the responsibility of States for internationaliy wrongful acts for the acceptance of international law in national law. Taking into account above all the large number of States with Roman-canon-law types of legal systems, the advantages of statute law for the effective application of the legal regime of the international responsibility of States must be given due weight in the deliberations of the working group of the Sixth Committee that will meet during the sixty-fifth session of the General Assembly.

7. In the light of the importance of the topic, the International Law Commission decided to recommend to the General Assembly that it should consider, at a later stage, the possibility of concluding a convention on the topic.[12] Almost a decade having passed since the General Assembly considered this recommendation, Mexico welcomes the establishment of the above-mentioned working group and reaffirms its belief that the best way in which the State responsibility articles can help to achieve the aims set forth in Article 13, paragraph 1 (a), of the Charter of the United Nations — whose importance has been consistently reaffirmed by the General Assembly in the context of this topic[13] — is through the adoption of a treaty.

Netherlands

1. The Netherlands would not want to exclude the possibility that the State responsibility articles will eventually be elaborated into a convention. However, we do not believe that negotiations should be initiated at the present time to develop a convention on the responsibility of States for internationally wrongful acts. We believe that the initiation of such negotiations at this moment in time may unravel the fragile balance in the text of the articles or result in the adoption of the text of a convention that may never enter into force or one that will not acquire universal or at least quasi-universal participation.

2. It is the opinion of the Netherlands that the greater part of the articles reflects customary international law. The incorporation of this part into a convention would add little to the development of international law. The remaining part of the articles could be regarded as *de lege ferenda* or a progressive development of international law. With respect to this part, we are convinced that the practice of States as well as the decisions of international courts, arbitral tribunals and other bodies will make a significant contribution to the development of customary international law in this

[12] A/56/10 and Corr.1, para. 73.

[13] See resolutions 56/83, 59/35 and 62/61.

area and that the crystallization of these articles into customary international law will benefit from more time.

3. The Netherlands considers the responsibility of States for internationally wrongful acts an important topic and believes that States should continue to acquire even wider experience with the application of the articles in practice. Therefore, we would like to consider the question of the adoption of or other appropriate action on the articles again, but not earlier than at the sixty-eighth session of the General Assembly, in particular in the light of further practice of States as well as decisions of international courts, arbitral tribunals and other bodies.

Portugal

1. It is now more than 60 years since the International Law Commission decided to embark on what is certainly one of its most important projects. This is a topic that has been maturing since 1949, when the Commission first selected the subject of State responsibility as suitable for codification. It was one of the first topics to be selected as meeting that criterion. Since then, the articles have been in a period of maturation. Portugal believes that the time is ripe for making a decision on future action regarding the articles.

2. Portugal recognizes that Member States have different views regarding the future of this topic, as reflected in the written comments that Governments, including our own, submitted in 2007.[14] Those views range from supporting a convention to merely adopting the articles in a General Assembly resolution.

3. As Portugal has already had the opportunity to state before the Sixth Committee and in our previous written comments on the matter, we continue to believe that this is an area of international law that deserves to be incorporated into a legal instrument that will certainly contribute in a decisive manner to respect for international law and to peace and stability in international relations.

4. States must not be overcautious about moving forward in this area, since the only concern is to establish the consequences of international wrongful acts, not to provide for a definition of the wrongful act itself. State responsibility concerns only the secondary rules, not the primary rules, which define the obligations of States.

5. If one wants convincing evidence as to the opportunity and fundamental need to proceed in this field, one has only to turn to State practice and to decisions of international courts and tribunals, including the case law of the International Court of Justice. The report prepared by the Secretary-General containing a compilation of decisions of international courts, tribunals and other bodies[15] clearly illustrates this.

6. Furthermore, it would be senseless not to proceed in the development and codification of this matter and to continue to proceed in other areas such as diplomatic protection, liability and responsibility of international organizations when the main principles guiding the development of these latter subjects are the same that apply to State responsibility.

[14] See A/62/63.

[15] A/62/62 and Corr.1 and Add.1.

7. Therefore, Portugal considers that the State responsibility articles should be adopted as a binding international convention.

Qatar

Qatar deems it appropriate that the United Nations General Assembly establish a subsidiary ad hoc committee or working group mandated with the consideration of further action regarding the State responsibility articles. In fact, Qatar leans towards the adoption by the Assembly of a consensus declaration that could contribute, by being cited in decisions of international courts and other international bodies, to the consolidation of the articles and lay the foundations for the next phase in the process of the adoption of a treaty on the responsibility of States for internationally wrongful acts.

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom remains firmly of the view, for the reasons previously expressed in our comments of 8 January 2007,[16] that the action of the General Assembly in commending the State responsibility articles to the attention of Governments was the right course of action and that embarking on the process of negotiating a convention is neither necessary nor desirable. We understand that other States share this view. The United Kingdom does not see any benefit to be gained in adopting a convention. The articles have continued to enter the fabric of international law through State practice, decisions of courts, tribunals and other bodies, and the writings of publicists.

2. The articles have frequently been cited or used in many different areas of international law, including trade law, the use of force and human rights. This has resulted in a wealth of jurisprudence.[17] The articles are also referred to in the work of foreign ministries and other Government departments and guide the practice of States. The impact of the articles is only likely to increase with time, as is evidenced by the increasing reference to the articles since their adoption by the General Assembly in 2001. On the other hand, if a convention is negotiated there is a significant risk that the current content and status of the articles would be undermined. The articles are the product of intense negotiation and compromise, with no State wholly satisfied with the text in every aspect. If the articles were reopened for the purposes of negotiating a convention, there would be a risk that the ensuing process might undermine the development of the law in this area. Given that the articles have continued in the process of naturally crystallizing into the fabric of international law, we remain strongly of the view that attempting to negotiate a convention is unnecessary and undesirable.

[16] See A/62/63.

[17] See A/62/62 and Corr.1 and Add.1.

United States of America

1. The United States believes that the action of the General Assembly in 2001[18] in commending the State responsibility articles to the attention of Governments with no further action at that time was the right course of action to adopt. We continue to believe that no further action with regard to the articles is necessary.

2. There is a large body of well-established State practice pertaining to many of the issues covered by the articles. The State responsibility articles have shown themselves to be useful in their current, non-binding form, as a guide for States and other international actors on either what the law is or how the law might be progressively developed. It is difficult to see what would be gained by the adoption of a convention. Indeed, the negotiation of a convention would risk undermining the very important work that has been undertaken by the Commission on this topic, particularly if a significant number of States did not ratify the resulting convention. For those reasons, the United States believes that no further action need be taken on this topic.

[18] See resolution 56/83.